

## LEGAL UPDATE

### Developments in cryptoland (ii)

Date: 23 January 2019

In our [previous Legal Update](#) we discussed the regulators' study in the field of crypto regulation. The study has led to two recommendations:

- (i) the introduction of a Money Laundering and Terrorist Financing (Prevention) Act licensing regime for fiat crypto exchange platforms and providers of crypto wallets, aimed at combating money laundering and terrorist financing in crypto exchange and storage; and
- (ii) advocating a European adjustment to the regulatory framework for corporate financing and aligning the national definition of security with European legislation.

This Legal Update discusses what the Minister of Finance has done or intends to do with these recommendations.

The Minister has indicated that he, together with the regulators, will consider what changes to European legislation are necessary and that he will endeavour to put these changes on the agenda in Brussels (recommendation (ii)). The Minister has also indicated that he will look into the possibilities for changing the definition of securities (recommendation (i)). The Minister has said that he takes a positive view of changing the definition of securities, but feels that any consequences of broadening the term for other financial products and other laws should be carefully considered. The Minister is expected to get back to this recommendation of the regulators in the course of 2019. In that regard, the regulators do not (yet) have any additional possibility to supervise cryptos that bear many similarities to securities.

As far as the Money Laundering and Terrorist Financing (Prevention) Act licensing requirement (recommendation (i)) is concerned, there is a concrete prospect of change. The Minister of Finance has already followed up on this recommendation by means of the AMLD5 [Implementation](#) legislative proposal. The proposed Section 23c of the Money Laundering and Terrorist Financing (Prevention) Act stipulates a licensing obligation for anyone who professionally offers (i) services for exchanging virtual and fiduciary currencies, or (ii) crypto wallets *in or from the Netherlands* (see below).

The licensing obligation in the Dutch legislator's legislative proposal goes further than [AMLD5](#), as AMLD5 requires (only) a registration of the aforementioned parties. The explanatory memorandum to the legislative proposal states that the reason for opting for a licensing system are the high risks associated with the service provision and the gatekeeper function of the providers of, in short, exchange platforms or crypto wallets. According to the explanatory memorandum, it is important that an assessment could be carried out in advance to determine whether the aforementioned providers are actually capable of sufficiently mitigating the risks of terrorist financing and money laundering. Accordingly, the conditions for obtaining a licence pertain only to compliance with the obligations under the Money Laundering and Terrorist Financing (Prevention) Act. Therefore, only the control measures in place under the Money Laundering and Terrorist Financing (Prevention) Act will be assessed and not the provider's operations.

Another (important) aspect of the licensing obligation concerns the fitness and properness of day-to-day policymakers of a provider of exchange platforms or crypto wallets.

This aspect of the licensing obligation arises directly from the Fourth and Fifth Anti-Money Laundering Directives. DNB must determine whether the day-to-day policymaker has sufficient relevant knowledge, skills and professional conduct to perform the function. In addition, DNB must test the reliability of the

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day-to-day policymaker. As may be known, this involves looking at intentions, actions and, in particular, antecedents that stand in the way of performing the function.

The international character of cryptos is recognised by the legislator. By using the words *in or from the Netherlands*, this licensing obligation cannot be circumvented by offering services in the Netherlands from another country or by offering services abroad from the Netherlands.

The Implementation Act amending the fourth anti-money laundering directive is in preparation. Last Tuesday the internet consultation about the Implementation Act was closed. AMLD5 should be implemented by 10 January 2020 at the latest.

This is a Legal Update from the Banking & Finance team.

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